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November 22, 2011

National Labor Relation Board
Office of the Executive Secretary
1099 14th Street NW
Washington, DC 20570

Re: Kerry, Inc. -and- Local 70, Bakery, Confectionery, Tobacco and Grain Millers International Union, AFL-CIO
Cases 7-CA-52965 and 7-CA-53192

Dear Sir or Madam:

Attached is an electronic copy of the Charging Party's Exceptions to the Administrative Law Judge's Decision with regard to the above matters, together with our Proof of Service. Information from Sharon Hodge's of your offices today, indicates that this document is considered "filed" pursuant to the NLRB's rules if it is e-field by 11:59 pm on the date it is due, which is today.

Very truly yours,

PINSKY, SMITH, FAYETTE & KENNEDY, LLP

Edward M. Smith

EMS:lbz
Enclosures
cc (w/ encs.): Andrew S. Goldberg, Esq.
Joseph P. Canfield, Esq.
Mr. Orin Holder

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 7

In the Matter of:

KERRY, INC.,

Respondent,

-and-

Case No. **GR-7-CA-52965**
GR-7-CA-53192

LOCAL 70, BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO,

Charging Party.

CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES, the Charging Party Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, and for its exceptions to the Administrative Law Judge's Decision says as follows:

The exceptions go only to that portion of the Decision relating to paying daily overtime.

The relevant Section of the Collective Bargaining Agreement between the Charging Party and Respondent, effective dates September 1, 2008 until August 31, 2013 (Exhibit GC-2, p 9):

> "Section 6.4 All employees will be paid time and one-half for all hours actually worked in excess of eight (8) hours per day or forty (40) hours per week but not for both. However, to qualify for daily overtime rates, the employee must work all of his scheduled hours in the week unless prevented by proven sickness or other similar reason satisfactory to his Supervisor."

At the time the parties first negotiated this language, the regular work schedule consisted of five 8-hour days per week. (ALJ Decision, pg 13, lines 11-12). The record is clear that Respondent, starting on August 26, 2010, unilaterally changed the bargaining unit employees' work week from a 5-day, 8-hour work week to a 4-day work week consisting of three 12-hour days and one 6-hour day. It is that change that brought about the Charges by the Union and Complaint by the General Counsel.

The ALJ after quoting stated as follows at page 13 of his Decisions (lines 30-34):

> "Although the collective-bargaining agreement provides that overtime will be paid for 'all hours actually worked in excess of eight (8) hours per day or forty (40) hours per week but not for both,' it doesn't specify **who would choose** whether to apply the 'in excess of 8 hours per day' or the 'in excess of 40 hours per week' definition." (emphasis added)

The ALJ's interpretation is clearly faulty. An employer is required to pay time and a-half for all hours worked over forty (40) hours per week. This requirement is found in the Fair Labor Standards Act of 1938, Section 7, as amended, 29 U.S.C.A. §207, et seq.

Neither federal or Michigan law requires an employer to pay daily overtime, i.e., time and one-half for over eight (8) hours per day. To pay daily overtime, the employer must agree to it in a collective bargaining agreement, as Respondent did in GC-2 and its predecessor, Respondent Ex. 6. This added benefit that the Union was successful in obtaining through bargaining, is valuable to its employees. It would be nonsensical for the Union to bargain this valuable benefit and yet leave it to the Employer to decide whether or not to abide by it.

It would follow from the reasoning of the ALJ that the clause "all employees will be paid time and one-half for all hours actually worked in excess of eight (8) hours per day" is meaningless and superfluous if the Respondent had the choice of not complying with that provision. In *How Arbitration Works*[1], Elkouri & Elkouri, 6th Edition, Interpreting Contract Language, Chapter 9.3 at page 464, states:

> "It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." (numerous citations omitted) (for convenience attached is Charging Party's Exceptions Exhibit A)

Thus, the phrase "All employees will be paid time and one-half for all hours actually worked in excess of 8 hours per day" must mean just that.

The ALJ's misunderstanding of the daily overtime provision is best shown at page 13 of his Decision (lines 10-17):

> "At the time the parties first negotiated this language, the regular work schedule (not including overtime) consisted of five 8-hour days per week. So long as this work schedule remained in effect, it made little if any difference whether overtime consisted of hours worked in excess of 8 per day or of hours worked in excess of 40 per week. For example, if an employee worked 8 hours on Monday, 8 hours on Tuesday, 10 hours on Wednesday, 8 hours on Thursday and 8 hours on Friday, it would not matter whether overtime was defined as hours in excess of 8 per day or 40 per week. Either way, the employee would be entitled to 2 hours overtime pay."

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[1] Long considered by labor law experts to be the standard text on labor arbitration and the most comprehensive and authoritative treatise available on the subject.

Although the above example is accurate only to a point, what the ALJ failed to realize is that any employee who does not reach 40 hours in a work week but works more than 8 hours on one or more days, is cheated out of the agreed upon benefit. For example, if an employee worked 8 hours on Monday, 8 hours on Tuesday, 10 hours on Wednesday, 8 hours on Thursday, and was sick[2] on Friday, it would clearly matter to the employee because he has not worked 40 hours but is entitled to 2 hours overtime pay because of the 2 hours of overtime he worked on Wednesday. He would not be entitled under Federal law (Fair Labor Standards Act of 1938, Section 7, as amended, 29 U.S.C.A. §207, et seq.), because he failed to work over 40 hours in the week.

It is true that if an employee worked in excess of 40 hours per week, the daily overtime would not come into play, pursuant to Section 6.4 of the CBA that states that an employee cannot be paid for both types of overtime (non-pyramid).

Under Section 6.4, to be entitled to any overtime, an employee must work all of his scheduled hours in the week unless prevented by proven sickness or other similar reason satisfactory to his Supervisor. Thus, the employee in the example would be entitled the 2 hours of overtime he worked on Wednesday.[3]

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[2] The clause requires "proven sickness".

[3] Interestingly, the then President of the Charging Party, William Arends, explained that while he was at the bargaining table in August of 2008, the Union attempted to remove the proviso requiring an employee to work all scheduled hours in the week to receive the daily overtime. He explained that the Charging Party's Collective Bargaining Agreement with Kellogg Company, where he had worked for 43 years, did not have that proviso, and the Charging Party bargained (unsuccessfully) to have that proviso removed from the CBA. (Hearing Transcript, pgs 348-350)

The ALJ repeats his misunderstanding of Section 6.4 at page 15 of his Decision (lines 32-33):

> "On its face, this language **allows** but does **not require** the payment of overtime for hours worked in excess of 8 per day." (emphasis supplied)

The ALJ's unusual interpretation of Section 6.4 is reflected in the fact that even the Respondent's Attorney Andrew Goldberg while testifying (see Hearing Transcript, pg 232-233) gave no such interpretation. Goldberg did not claim that 6.4 "on its face" did not require payment of overtime for hours worked in excess of 8 per day. Attorney Goldberg relied on his interpretation of past practice only[4]. Moreover, in Respondent's 42-page Post-Hearing Brief, there is no mention of the Respondent having the **option** of choosing which overtime provision it would apply (8 hours per day or 40 hours per week). In all the testimony regarding the bargaining that took place in August of 2008 leading up to the current CBA (GC-2), there is no reference at all to the Respondent having this choice.

Clearly, the ALJ's interpretation of Section 6.4 is wrong.

The ALJ's wrongful interpretation can only result in the reversal of his Decision that held the Respondent did not engage in conduct that violated Section 8(a)(5) and (1) or Section 8(d) of the Act.

> "For the reasons discussed above, I have found that Respondent did not make a unilateral change in the payment of overtime." (ALJ Decision, pg 43).

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[4] See Charging Party's Post-Hearing Brief regarding the inapplicability of past practice in this case.

The ALJ did find violations of Section 8(d) and Section 8(a)(5) and 8(a)(1) of the Act regarding Respondent's failure to adhere to contractual provisions as to the length of breaks and the application and payment of shift premiums. (ALJ Decision, pg 51, paras 3-4).

The ALJ in finding the Respondent violated Section 8(d), relied on *Bath Iron Works Corp.* 345 NLRB 499. At page 41 of his Decision, the ALJ followed the Board's explanation found in *Bath*, supra, regarding the difference between a "unilateral change" and "contract modification" case. He went on to say a defense to a "unilateral change" can be "that the union has waived its right to bargain." However, a defense to "contract modification" would be "that the union had consented to the change." The record is void of any reference to Respondent consenting to such change. The ALJ followed the remedy for "contract modification," when he ordered the Respondent to adhere to the terms and conditions of employment provided in the Collective Bargaining Agreement regarding changes made in the number and length of breaks and the application and payment of shift premiums. (ALJ Decision, pg 42).

Charging Party submits that the ALJ should also have found and the Board should now find that the Respondent failed to adhere to Section 6.4 of the CBA and, thus, modified the contract in violation of Section 8(d).

REMEDY

Charge Party urges the Board order the Respondent to adhere to Section 6.4 of the CBA and pay overtime for all hours worked beyond 8 hours per day beginning on

August 22, 2010, when Respondent changed its work week from 5 days per week to 4 days per week, consisting of three 12-hour days and one 6-hour day. By such changes, the requirement to pay overtime for hours worked over 8 hour per day comes into play, resulting in the obligation to pay 4 hours of overtime for each 12 hour day. (Charging Party acknowledges that employees cannot receive overtime for both daily overtime and weekly overtime as the Contract provides.)

The Charging Party requests the Board order that effected employees be made whole, with interest compounded daily, for all losses they suffered because of Respondent's unlawful changes in the terms and conditions of employment related to its non-payment of overtime for hours worked in excess of 8-hours per day[5].

Respectfully submitted,

PINSKY, SMITH, FAYETTE & KENNEDY, LLP
Attorneys for Charging Party

Dated: November 22, 2011

By 
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[5] It should be noted that Respondent, because of a recent downturn in business, no longer has its employees work the 4-day work week; instead in early October 2011, it reverted back to the 5-day, 8-hours per week schedule. Since then, Respondent is paying daily overtime for work beyond 8 hours. This results in a closed period for any back-pay award.

> It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.[163]

The principle extends not only to entire clauses, but also to individual words. Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement.[164] It is only when no reasonable meaning can be given to a word or clause, either from the context in which it is used or by examining the whole agreement, that it may be treated as surplusage and declared to be inoperative.[165]

ix. Company Manuals and Handbooks [LA CDI 24.111]

Company-issued booklets, manuals, and handbooks that have not been the subject of negotiations or agreed to by the union have been found by arbitrators to constitute "merely a unilateral statement by the Company and [are] not sufficient to be binding upon the Union."[166] However, policy manu-

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[163]John Deere Tractor Co., 5 LA 631, 632 (Updegraff, 1946). *See also* Russell, Burdsall & Ward Corp., 84 LA 373 (Duff, 1985); Maritime Serv. Comm., 49 LA 557, 562–63 (Scheiber, 1967).

[164]Armstrong Rubber Co., 87 LA 146, 150 (Bankston, 1986); Beatrice Foods Co., 45 LA 540, 543 (Stouffer, 1965); Borden's Farm Prods., 3 LA 401, 402 (Burke, 1945). Other cases where this rule was applied include *Independent Sch. Dist. 11*, 97 LA 169, 173 (Gallagher, 1991); *VME Ams.*, 97 LA 137, 138 (Bittel, 1991); *Nelson Tree Serv.*, 95 LA 1143, 1147 (Loeb, 1990); *City of Melbourne, Fla.*, 91 LA 1210, 1212 (Baroni, 1988); *Alpha Beta Stores*, 91 LA 888, 894 (Richman, 1988); *Plough, Inc.*, 90 LA 1018, 1020 (Cromwell, 1988); *City of N. Las Vegas, Nev.*, 90 LA 563, 566 (Richman, 1988); *General Tel. Co. of the Southwest*, 86 LA 293, 295 (Ipavec, 1985) ("It is a rule of contract interpretation that each word and phrase of a contract is to be given meaning on the theory that if the parties to the contract had not intended to give each word and each phrase meaning, then they would have deleted such language in order to assist the eventual interpreter."); *Pittsburgh Bd. of Pub. Educ.*, 85 LA 816 (Bolte, 1985); *GTE Prods. Corp.*, 85 LA 754, 757 (Millious, 1985) ("If the parties had intended that continuous service was the same as seniority, then the language of Article 8 separately setting forth continuous service as a condition for payment would be unnecessary and redundant."); *Hamady Bros. Food Mkt.*, 82 LA 81, 84 (Silver, 1983) ("It is presumed as an essential part of any collective bargaining agreement that all terms and conditions stated therein shall be given effect reasonably.").

[165]American Shearer Mfg. Co., 6 LA 984, 985–86 (Myers, 1947). *See also* Western Employers Council, 49 LA 61, 62–63 (McNaughton, 1967).

[166]Greer Steel Co., 50 LA 340, 343 (McIntosh, 1968). *See also* City of Miamisburg, Ohio, 104 LA 228, 232–34 (Fullmer, 1995) (educational incentive provision in collective bargaining agreement controlled rather than provision concerning education reimbursement in employee handbook); Rhone-Poulenc, 103 LA 1085, 1087–88 (Bernstein, 1994) (statement in employee benefits handbook reserving right to employer to change benefits plan did not alter binding commitments made in collective bargaining agreement); Centel Bus. Sys., 95 LA 472, 478 (Allen, Jr., 1990) ("Company-created handbook cannot take precedence over labor agreement language if there is conflict."); Hughes Airwest, 71 LA 1123, 1125 (Roberts, 1978); Westinghouse Elec. Corp., 45 LA 131, 140 (Hebert, 1965). A company's interoffice memorandum was held not binding on the company where it had not been adopted as a contract between the parties by either formal amendment or past practice. Tenn Flake of Middlesboro, 55 LA 256, 258 (May, 1970). The term "manual" as used in this topic does not relate to the *Federal Personnel Manual*, which is highly relevant in federal-sector arbitration. Regarding that *Manual*, and regarding other special considerations relating to the federal sector, see Chapter 20, section 4.A.ii.c., "Governmentwide Rules or Regulations," and section 4.A.ii.d., "Nongovernmentwide Rules or Regulations."

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
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KERRY, INC.,

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LOCAL 70, BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO,

Charging Party.

PROOF OF SERVICE

Edward M. Smith, hereby declares and says that on November 22, 2011, **Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, Charging Party's Exceptions to the Administrative Law Judge's Decision,** together with this Proof of Service, was served via email upon the attorney for Respondent, Andrew S. Goldberg, at his email address of agoldberg@lanermuchin.com and NLRB General Counsel Joseph P. Canfield, Esq. at Joseph.Canfield@NLRB.gov.

Edward M. Smith